

(2)
No. 88-135

Supreme Court, U.S.
FILED
AUG 17 1988
JOSEPH F. SPANGLER
CLERK

In The
Supreme Court of the United States
October Term, 1987

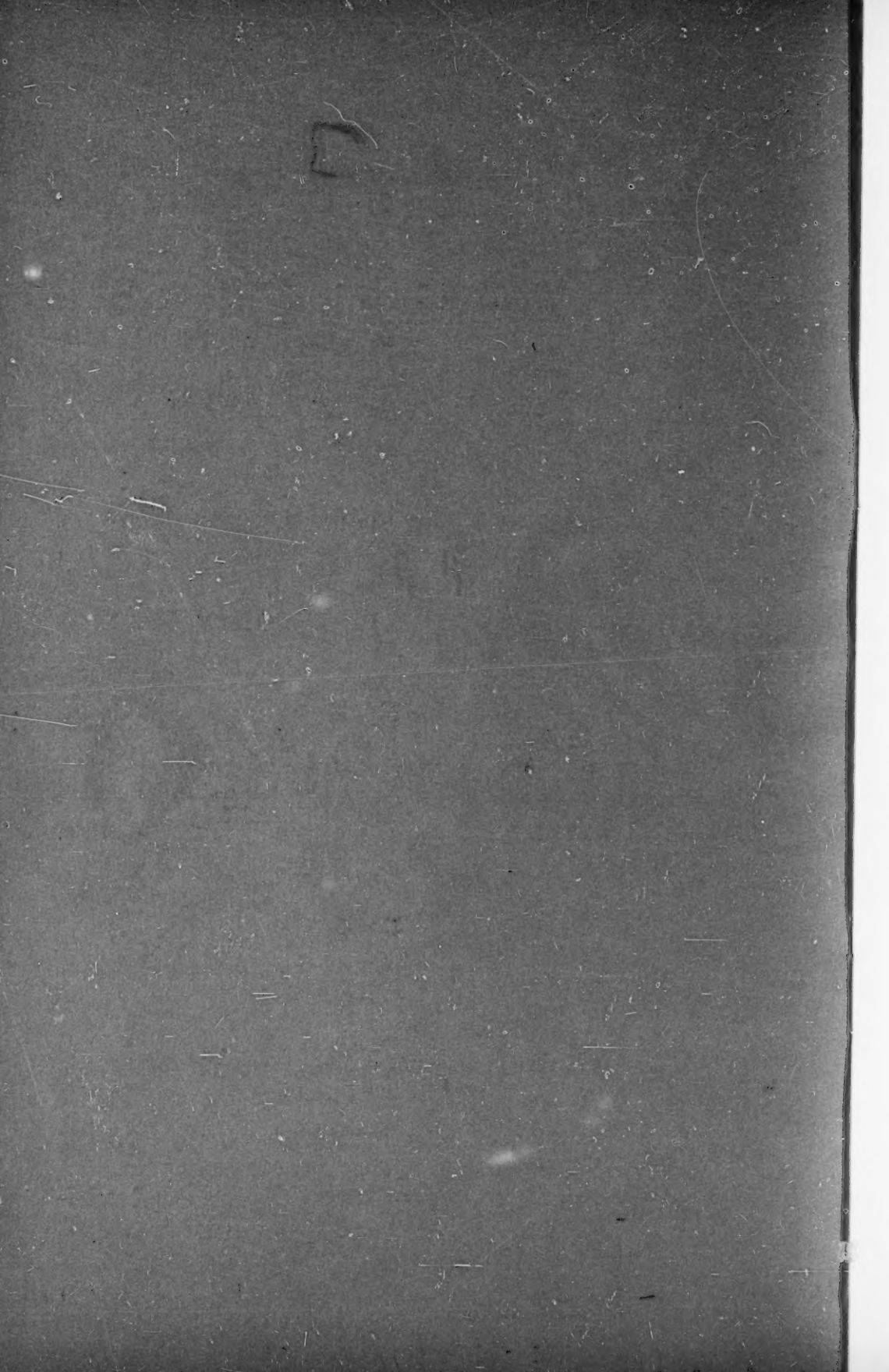
JOHN DeSIMONE and HELEN DeSIMONE,
his wife,
Petitioners,
vs.

RICHARD L. BOVE, M.D.,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOSEPH T. BODELL, JR., ESQUIRE
RICHARD D. HARBURG, ESQUIRE
SWARTZ, CAMPBELL &
DETWEILER
1700 Land Title Building
Philadelphia, PA 19110
(215) 564-5190

*Attorney for Respondent,
Richard L. Bove, M.D.*



QUESTION PRESENTED

Where a new State Appellate Court Decision which neither alters nor overrules established and controlling issues of state law is handed down during the pendency of an appeal, has a Federal Court of Appeals by relying upon the very same precedents exclusively relied upon in the new State Appellate Court decision so far departed from the accepted and usual course of judicial proceedings so as to warrant an exercise of this Court's power and supervision by Writ of Certiorari?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	7
APPENDIX A	
Opinion, U.S. Court of Appeals for the Third Circuit, Filed MAR 29, 1988	App. 1
APPENDIX B	
Judgment, U.S. Court of Appeals for the Third Circuit, Filed MAR 29, 1988	App. 1
APPENDIX C	
Rehearing Denial, U.S. Court of Appeals for the Third Circuit, Filed APR 21, 1988	App. 1
APPENDIX D	
Civil Judgment, U.S. District Court for the Eastern District of Pennsylvania, Filed SEP 16, 1987	App. 2
APPENDIX E	
Excerpts From Pages of Appellate Record	App. 3

TABLE OF AUTHORITIES

Page

CASES

<i>Cooper v. Roberts</i> , 220 Pa. Super. 260, 286 A.2d 647 (1971)	6, 7, 8
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	6
<i>Festa v. Greenberg</i> , 354 Pa. Super. 346, 511 A.2d 1371 (1986)	7
<i>Jozsa v. Hottenstein</i> , 364 Pa. Super. 469, 528 A.2d 606 (1987)	4, 7, 8
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965)	6
<i>Sagala v. Tavares</i> , ___ Pa. Super. ___, 533 A.2d 165 (1987)	4, 5, 6, 7, 8
<i>United States v. Schooner Peggy</i> , 5 U.S. (1 Cranch) 103 (1801)	6
<i>Vandenbark v. Owens-Illinois Glass Co.</i> , 311 U.S. 53 (1941)	5, 6, 8

STATUTES

28 U.S.C. § 1254(1)	2, 5
---------------------------	------

SUPREME COURT RULE

Rule 17.1	5
-----------------	---



No. 88-135

In The
Supreme Court of the United States
October Term, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix A) is not officially reported. There was no opinion of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on March 29, 1988. A timely Petition for Rehearing was denied on April 21, 1988 (Appendix C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners, John DeSimone, ("DeSimone"), and Helen DeSimone brought this malpractice action against Respondent, Dr. Richard L. Bove, claiming that Dr. Bove negligently performed a colonoscopy and failed to obtain DeSimone's informed consent. DeSimone alleged that Dr. Bove performed the colonoscopy in a negligent manner so as to perforate DeSimone's colon. DeSimone's theory on informed consent was that Dr. Bove failed to inform DeSimone of an alleged alternative radiological procedure and that Dr. Bove failed to inform DeSimone that perforation was a known risk of the colonoscopy procedure.

DeSimone's negligent performance claim went to the jury. The jury found that Dr. Bove was not negligent in his performance of the colonoscopy procedure.

With respect to the allegation that Dr. Bove failed to inform DeSimone that the perforation was a known risk of the colonoscopy procedure, the District Court properly directed a verdict for Dr. Bove. The Petitioner himself testified that he recalled Dr. Bove informing him that the colonoscopy procedure carried with it a risk of perforation, and that he was aware of and understood the risk at the time of the procedure. The Court of Appeals found that under these circumstances the District Court properly directed the verdict for Dr. Bove. As the Court of Appeals pointed out, the Court directed this verdict

based on its perception that a patient must understand the risk involved in a procedure, whether or not he was aware of all the medical detail that led to that risk. During the trial, Mr. DeSimone admitted that he understood the risk of perforation inherent in the procedure. Furthermore, there is no evidence to suggest that diverticulosis increases the incidence of perforation of the colon. Accordingly, no expert familiar with DeSimone's condition testified that it rendered him materially more susceptible to perforation. Thus, in light of Mr. DeSimone's admissions at trial and the expert medical testimony on point, the District Court properly directed the verdict and this decision was appropriately affirmed by the Court of Appeals.

Petitioner's alternative procedure theory of informed consent went to the jury. The jury found that in order for DeSimone to make an intelligent choice concerning the treatment he was to receive from Dr. Bove, it was not necessary for DeSimone to have been informed that a barium enema was an alternative to a full colonoscopy. It was undisputed that Dr. Bove did not inform DeSimone that a procedure known as a barium enema might be performed in lieu of a colonoscopy. However, the expert witnesses at trial completely disagreed as to whether this alleged alternative procedure, the barium enema, was a viable alternative to the colonoscopy. The jury agreed with Dr. Bove's experts which indicated that the barium enema was not at the time of the procedure a viable alternative to a full colonoscopy. Accordingly, the jury found that a reasonable person in Mr. DeSimone's position would not have considered the barium enema

alternative important in making his decision whether to undergo treatment.

Petitioner, by distorting both context and application, objects to the "specialist standard" instructions given by the District Court. However, such an instruction was correct. The law in Pennsylvania is clear that expert medical testimony is necessary to establish the existence and magnitude of the risks of a recommended medical procedure, as well as viable alternatives. *Jozsa v. Hottens-tein*, 364 Pa. Super. 469, 528 A.2d 606 (1987). As the Court of Appeals pointed out in its opinion, the District Court took great care to twice remind the jury that expert witnesses had disagreed as to whether the alternative procedure, the barium enema, was a viable alternative to the colonoscopy. Specifically, the Court told the jury:

[i]f you believe that at the time this was an alternative accepted by specialists in that field and the plaintiff should have known it in order to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent.

The Court of Appeals found that the specialist standard discussed by the District Court clearly related to the testimony required to establish the existence of an alternative treatment and not to what a reasonable patient would consider important. Accordingly, the Court of Appeals correctly found that the jury charge properly and fully conformed to the law of Pennsylvania on informed consent. (See Appendix E.)

Petitioner now contends that an informed consent case involving "the same issues" which was decided two months after the District Court's judgment, warrants a

reversal of the jury verdict on the informed consent issue. *Sagala v. Tavares*, ___ Pa. Super. ___, 533 A.2d 165 (1987).

Even a cursory reading of *Sagala* indicates that the judicial decision rendered neither altered nor overruled any earlier case law. In fact, the Court in *Sagala*, relied exclusively on the very same Superior Court decisions relied upon by the Court of Appeals in the case at bar.

REASONS FOR DENYING THE WRIT

A review on Writ of Certiorari is not a matter of right, but a matter of judicial discretion, and will be granted only when there are special and important reasons therefor. 28 U.S.C. Supreme Court Rule 17.1. The Petitioner seeks to have this Honorable Court review a decision from the United States Court of Appeals which: (1) is not in conflict with a decision of any Federal Court of Appeals, or any other State Court of last resort; (2) is not in conflict with applicable decisions of this Honorable Court; (3) does not present a question of federal law which must be settled by this Honorable Court; and (4) is entirely consistent and appropriate under the laws of the Commonwealth of Pennsylvania. See Supreme Court Rule 17.1(a), (b), and (c).

Notwithstanding the above, the Petitioner claims that the Court of Appeals has ignored the Court's decision in *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941), and thereby so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Honorable Court's power and supervision. The *Vandenbark* case was a diversity case which held

that the doctrine of *Schooner Peggy*¹, in effect, was incorporated in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, (1938). Specifically, *Vandenbark* stands for the principle that a Federal Court sitting in a diversity case, must apply the most recent state court decision where such decision altered or overruled earlier case law. *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941); *Linkletter v. Walker*, 381 U.S. 618, 626 (1965), FN. 10.

Petitioner, however, relies upon a Pennsylvania Superior Court decision which neither altered nor overruled earlier Pennsylvania case law but which relied exclusively upon the very same precedents relied upon by the Court of Appeals in the case at bar. In *Sagala v. Tavares*, ___ Pa. Super. ___, 533 A.2d 165 (1987), the Court expressly quoted and relied upon the following passage from *Cooper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971):

Consent to medical treatment is valid if the physician disclosed all those facts, risks and alternatives that a reasonable man in the situation which the physician knew or should have known to be the plaintiffs, would deem significant in making a decision to undergo the recommended treatment. The physician is bound to disclose only those risks which a reasonable man would consider material to his decision whether or not to undergo treatment. *Cooper v. Roberts*, 220 Pa. Super. at 267-268, 286 A.2d at 650 (1971).

The Court of Appeals in the case at bar relied and expressly quoted the exact same passage from *Cooper*

¹ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

as re-printed in *Sagala* in their decision. (See Appendix A-1 at page 5).

The Court in *Sagala*, also cited *Jozsa v. Hottenstein*, 364 Pa. Super. 469, 528 A.2d 606 (1987) with approval. In *Jozsa*, the Superior Court of Pennsylvania held that the law in Pennsylvania requires expert medical testimony to establish the existence and magnitude of the risks of recommended medical procedure, as well as the existence of alternatives. In short, under Pennsylvania law, expert testimony as to the existence of an alternative procedure must be established. Once established, the materiality of the alternative is determined under the reasonable man standard by the jury. *Jozsa v. Hottenstein*, *Supra.*; *Cooper*, *Supra.*; and *Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986).

The *Sagala* case neither alters nor overrules this established Pennsylvania law. The mere fact that the Court of Appeals cited the authorities relied upon exclusively by *Sagala* – as opposed to citing to *Sagala* itself – is not in any way a departure from the accepted and usual course of judicial proceedings, nor in any way is it such a departure so as to call for an exercise of this Honorable Court's power and supervision.

The Court of Appeals' affirmance of the District Court was entirely consistent with Pennsylvania law and in no way presents grounds for the granting of this Writ.

CONCLUSION

The United States Court of Appeals for the Third Circuit relied upon the established and the controlling Pennsylvania law on informed consent. Pennsylvania

Courts have adopted the "prudent patient" standard of informed consent under which valid informed consent is not dependent upon the standards of the medical community. However, the law in Pennsylvania is also clear that expert medical testimony is necessary to establish the existence and magnitude of the risks of a recommended medical procedure, as well as the existence and viability of alternative procedures. In reaching these very same conclusions, the Court of Appeals relied upon *Cooper v. Roberts*, 220 Pa. Super. 260, 267-268, 286 A.2d 647 (1971), and *Jozsa v. Hottenstein*, 364 Pa. Super. 469, 528 A.2d 606 (1987), the very same cases relied exclusively upon by the Superior Court decision in *Sagala*. Inasmuch as *Sagala* neither altered nor changed this well-established Pennsylvania law, the doctrine espoused in *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941) is inapplicable.

WHEREFORE, Respondent respectfully prays that a Writ of Certiorari be denied.

Respectfully submitted,

SWARTZ, CAMPBELL & DETWEILER
JOSEPH T. BODELL, JR., ESQUIRE
RICHARD D. HARBURG, ESQUIRE
Attorney for Respondent,
Richard L. Bove, M.D.
1700 Land Title Building
Philadelphia, PA 19110
I.D. #06647

App. 1

APPENDIX A

Opinion, U.S. Court of Appeals for the
Third Circuit, Filed MAR 29, 1988

See Petitioner's Appendix A

APPENDIX B

Judgment, U.S. Court of Appeals for the
Third Circuit, Filed MAR 29, 1988

See Petitioner's Appendix B

APPENDIX C

Rehearing Denial, U.S. Court of Appeals
for the Third Circuit, Filed APR 21, 1988

See Petitioner's Appendix C

App. 2

APPENDIX D

Civil Judgment, U.S. District Court for the Eastern
District of Pennsylvania, filed SEP 16, 1987

See Petitioner's Appendix D

**APPENDIX E - Excerpts From Pages of Appellate
Record**

The lower court informed the jury of DeSimone's burden of establishing the existence of the alternative procedure:

If you believe Dr. Bove, in not including in his discussion with the plaintiff the fact of the availability of a barium enema as an alternative, [was] following what the specialists skilled in his field would have done at the time . . . he cannot be liable because he wasn't required to inform the patient. [458a]

It is only an intelligent choice if the alternative method has some meaning or would work or if the specialist in the community thinks it is really an alternative to what is to be done. [459a]

The court then instructed the jury with respect to informed consent by apprising them of the reasonable man test for materiality:

[T]he physician must obtain the patient's consent that must be informed - what we mean by this is that he must inform the patient of the nature of the proposed procedures and treatment and the risks involved to the extent that a reasonable patient in the plaintiff's position would have considered certain risks important.

He must also inform him of other methods of treatment that the doctor believes that the patient in his position would have considered important in making a decision. [458a].

The lower court's next instruction then consolidated these two points:

[I]f you believe that at that time [the barium enema] was an alternative accepted by specialists in that field and the plaintiff should have known it in order

App. 4

to make an intelligent choice, the plaintiff was entitled to have that before he consented, and the consent without that would not be consent. [459a-460a]

The lower court's response to the jury's request to reinstruct:

informed consent – means that the physician is bound to disclose to the patient all those facts which a reasonable man, in the situation in which the doctor knew or should have known to be his patient's situation, would consider it important to the patient's decision whether to undergo treatment. [488a]

The Court then reminded the jury that application of the prudent patient standard depends upon the existence of an alternative treatment which a reasonable person in DeSimone's condition would deem material:

You, the jury, should determine whether or not a reasonable person in Mr. DeSimone's position would have considered that to be important in making his decision. It is going to depend on the extent to which you believe that alternative was necessary for an intelligent choice to be made by Mr. DeSimone.

Was Mr. DeSimone fully informed of that alternative? First, you have the question of whether it was a real alternative, first. [489a-490a]

Taken in light of the expert testimony and the two-step test for materiality, the charge as a whole correctly informed the jury of the law of Pennsylvania.

